Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-250

CITY OF CHARLOTTE, a Municipal Corporation, THE CHARLOTTE CITY COUNCIL, the Governing Legislative Body of the City of Charlotte, and FRED ALEXANDER, JAMES WHITTINGTON, MILTON SHORT, JOE WITHROW, PAT LOCKE, KENNETH R. HARRIS, and NEIL C. WILLIAMS, as Members of the Charlotte City Council and Individually,
Petitioners-Appellants,

v.

LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, an Unincorporated Labor Organization, and R. L. MIDDLETON, W. M. BRAWLEY, D. F. BLACK, M. L. KNIGHT and R. D. McCALL, as Officers of Local 660 and Individually,
Respondents-Appellees.

BRIEF AND ARGUMENT

Of Mel Bailey, Sheriff of Jefferson County, Alabama, Amicus Curiae on Behalf of Petitioners-Appellants

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-250

CITY OF CHARLOTTE, a Municipal Corporation, THE CHARLOTTE CITY COUNCIL, the Governing Legislative Body of the City of Charlotte, and FRED ALEXANDER, JAMES WHITTINGTON, MILTON SHORT, JOE WITHROW, PAT LOCKE, KENNETH R. HARRIS, and NEIL C. WILLIAMS, as Members of the Charlotte City Council and Individually,
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LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, an Unincorporated Labor Organization, and R. L. MIDDLETON, W. M. BRAWLEY, D. F. BLACK, M. L. KNIGHT and R. D. McCALL, as Officers of Local 660 and Individually,
Respondents-Appellees.

BRIEF AND ARGUMENT

Of Mel Bailey, Sheriff of Jefferson County, Alabama, Amicus Curiae on Behalf of Petitioners-Appellants

INTEREST OF AMICUS CURIAE

Melvin Bailey, Sheriff of Jefferson County, Alabama, (hereinafter "Bailey") appears *amicus curiae* pursuant to the consent of all parties. U. S. Sup. Ct. Rule 42. 28 U.S.C.A. (A-1).

Bailey was the "lead" defendant in *American Federation of State, County & Municipal Employees Union, AFL-CIO, Local No. 2257, et al. v. Melvin Bailey, Sheriff of Jefferson County, et al.*, Civil Action No. 75M 0021, United States District Court for the Northern District of Alabama, Southern Division. Plaintiffs therein are a voluntary, unincorporated labor organization which purports to represent certain deputy sheriffs employed by the Jefferson County Sheriff's Department and individual members of said union who are employed by the Jefferson County Sheriff's Department. Plaintiffs, *inter alia*, sought that Bailey and the Commissioners of Jefferson County, Alabama, under 42 U.S.C. 1983, be compelled to check off union dues of employees of the Jefferson County Sheriff's Department, alleging that other deductions from the paychecks of employees of the Sheriff's Department were allowed (A-3). On March 17, 1975, the District Court, Hon. Frank H. McFadden, Chief Judge, dismissed the said portion of the complaint alleging a deprivation of plaintiffs' rights under the equal protection clause of the Fourteenth Amendment by virtue of defendants' refusal to allow check off for union dues. (A-7). Expressly declining to follow Judge McMillan's September 4, 1974, order entered in the instant cause, Judge McFadden ruled that dues check off is inextricably intertwined with the collective bargaining process, and inasmuch as the Sheriff of Jefferson County and the Jefferson County Commission have no duty to bargain collectively with any representatives of their employees under Alabama or Federal law, these plaintiffs could not force defendants to concede on one aspect of collective bargaining, i.e., dues check off.

The case was subsequently dismissed pursuant to Rule 41(b), Federal Rules of Civil Procedure, for failure of plaintiffs to further prosecute, but a motion to reinstate it in its entirety has been briefed and argued and is presently pending. Thus there are conflicting decisions on the issue, one by the United States Court of Appeals for the Fourth Circuit and one by the United

States District Court for the Northern District of Alabama (in the Fifth Circuit). *See*, U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

On August 26, 1975, Bailey filed Civil Action No. 193-537 in the Circuit Court for the Tenth Judicial Circuit of Alabama (In Equity), seeking a declaratory judgment that defendants therein, the members of the Jefferson County Commission, had no legal authority to check off union dues of the employees of the Jefferson County Sheriff's Department, or to order Bailey to do so. (A-11). On October 6, 1975, the Circuit Court, by Hon. William C. Barber, Judge, ordered that neither the County Commission of Jefferson County, Alabama, nor the Sheriff of Jefferson County could implement any check off of union dues of the employees of the Jefferson County Sheriff. (A-17). Defendants and intervenor (AFL-CIO) in that cause have taken an appeal to the Supreme Court of Alabama.

SUMMARY OF ARGUMENT

The issue of union dues check off is an essential concomitant of the collective bargaining process. The City of Charlotte has no duty to collectively bargain with its employees. Indeed, it is prohibited by law from doing so. Since there is no fundamental right to collective bargaining, and inasmuch as check off is inextricably intertwined with the collective bargaining process, the City's refusal to check off union dues is simply a justifiable refusal to do that which it is not obligated to do, i.e., bargain collectively with its employees. The refusal impinges not upon respondents' First Amendment rights to freedom of association, but only upon their nonexistent "right" to collective bargaining, the right they are really looking for.

Collective bargaining is a give and take process, and one of the possible fruits thereof is union dues check off. To hold that respondents are constitutionally entitled to union dues check

off is to give them the fruits of collective bargaining when they are not entitled to collective bargaining in the first place. The right of collective bargaining should be conferred upon respondents, if at all, only by Congress or by the Legislature of the State of North Carolina.

Having been unsuccessful in their prior attempts to obtain declarations that they have a constitutional right to collective bargaining, respondents are now seeking to elevate one of the *fruits* of collective bargaining to the status of a "fundamental right".

Lastly, the practical effect of such a constitutional innovation would be disastrous.

ARGUMENT

Both of the lower courts in the instant case failed squarely to address the City's main argument that a request for union dues check off is distinguishable from a deduction for medical or life insurance or United Way because dues check off is inextricably intertwined with collective bargaining, which is forbidden to the City. N.C. G.S. 95-98; *N.C. Attorney General Reports*, 1968-70, Volume 40, at page 591; *see, Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D. N.C. 1969); *Winston-Salem/Forsyth City U. N.C. Assn. of Ed v. Phillips*, 381 F. Supp. 644 (W.D. N.C. 1974) (Three Judge Court). The District Court recognized that the City is not obligated to bargain collectively with its employees. *Local 660, International Association of Firefighters, et al. v. The City of Charlotte*, 381 F. Supp. 500, 503 (W.D. N.C. 1974). *Accord, Government & Civil Employees Organizing Committee, C.I.O. v. Windsor*, 116 F. Supp. 354 (N.D. Ala. 1953) (Three Judge Court) *aff'd* 347 U.S. 901, 74 S. Ct. 429, 98 L. Ed. 1061 (1954).

This holding was implicitly affirmed by the Court of Appeals for the Fourth Circuit, which found that this limitation in the City's obligation does "not justify denying the request for withholding made by plaintiffs in this case."

Neither the District Court nor the Court of Appeals concluded that the City's refusal to check off union dues impinged upon respondents' First Amendment rights to freedom of association, despite the fact that the basis of the plaintiffs' complaint had been the First Amendment. The refusal to check off dues is so indirectly related to respondents' First Amendment rights that no such impingement exists. *C.O.P. v. City of Chicago*, 382 F. Supp. 624, 628 (N.D. Ill. 1974); *University of N.H. Ch. of A.A.U.P. v. Haselton*, 397 F. Supp. 107, 108 (D.N.H. 1975) (Three Judge Court); *See, Kirker v. Moore*,

308 F. Supp. 615, 621 (S.D. W. Va. 1970); *aff'd* 436 F. 2d 423, *cert. den.* 404 U.S. 824, 92 S. Ct. 49, 30 L.Ed. 2d 51 (1971); *Newport News F.F.A. Loc. 794 v. City of Newport News*, 339 F. Supp. 13, 17 (E.D.Va. 1972). Contrary to all authority the District Court and Court of Appeals found no distinction between union dues check off and withholdings for other purposes, and concluded that the City's refusal was arbitrary and constituted invidious discrimination against respondents. This was a judicial invention to which nothing in the pleadings pointed.

Collective Bargaining

As implicitly admitted by both lower courts, the City has no duty to collectively bargain with respondents or their union. Although the National Labor Relations Act is here inapplicable,* it does furnish some guidance as to the meaning of "collective bargaining." The Act requires employers and bargaining agents of employees to bargain with each other with regard to wages, hours and other terms and conditions of employment. National Labor Relations Act, §§ 8(a)(5), (d), 29 U.S.C.A. §§ 158(a)(5), (d); *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964).

The term "other terms and conditions of employment" subsumes dues check off. Indeed, check off has been held to be a "proper" subject of collective bargaining, *N.L.R.B. v. Reed and Prince Mfg. Co.*, 205 F. 2d 131, 136 (1st Cir.) *cert. denied*, 346 U.S. 887, 74 S. Ct. 139, 98 L. Ed. 391 (1953). And it has been held to be a "mandatory" subject of collective bargain-

* The term "employer" as used in the Act does not include the States or their political subdivisions. 29 U.S.C.A. § 152(2); *See, Bateman v. South Carolina State Port Authority*, 298 F. Supp. 999 (D.S.C. 1969).

ing under §§ 8(a)(5) and 8(d). *United Steel Workers of America v. N.L.R.B.*, 390 F. 2d 846, 849 (D.C. Cir.), *cert. denied*, 391 U.S. 904, 88 S.Ct. 1654, 20 L.Ed.2d 419 (1968).

In the private sector, employers are required only to bargain in good faith on the check off issue. Since the City has no duty even to bargain collectively on the check off issue or any other "proper" subject, it perforce has no duty to accede to a check off demand. In the give and take process of collective bargaining, a union might concede a point in order to obtain the benefits of check off. Respondents are seeking one of the fruits of this process when they are not entitled, as a matter of law, to any of those fruits.

The Fourth Circuit ignored the authorities cited by the City because in those cases "the request for withholding arose and was denied in the context of collective bargaining." The Fourth Circuit has stated the ultimate *non sequitur*. What the Fourth Circuit is saying is that dues check off can be denied by a City engaged in collective bargaining, but a City cannot deny it where there is no collective bargaining. Anomaly of anomalies. Hon. Frank H. McFadden and Hon. William C. Barber both correctly felt that the collective bargaining process is inextricably intertwined with the dues check off system. The two can't be separated, even in some mystical or theoretical way. The Fourth Circuit was both illogical and impractical.

Equal Protection

Equal protection analysis has two steps. In cases where there is an impingement of a fundamental right by a statute, rule or policy, or where a statute, rule or policy creates a classification which is based on criteria that are inherently "suspect", said impingement or classification may be justified only upon the showing of a "compelling state interest." *See*, e.g., *Houston v. Prosser*,

361 F. Supp. 295, 297 (N.D. Ga. 1973), and the cases cited therein. If, on the other hand there is no fundamental right involved or no suspect classification, the statute, rule or policy need only bear some rational relationship to a legitimate governmental interest. In short, where the asserted right is "explicitly or implicitly guaranteed by the Constitution," the challenged policy, statute or practice is subjected to strict judicial scrutiny. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33-34, 93 S. Ct. 1278, 36 L. Ed. 2d 16, *reh denied* 411 U.S. 959, 93 S. Ct. 1919, 36 L. Ed. 2d 418 (1973) (hereinafter cited as *Rodriguez*). Assuming, then, that respondents possess a First Amendment right to belong to the union, but that the City has no duty to collectively bargain with them, the issue becomes whether the City's refusal to check off union dues is merely a justifiable refusal to collectively bargain or is an arbitrary classification of respondents constituting an invidious discrimination in violation of their Fourteenth Amendment rights to equal protection of the laws.

Apparently, neither of the lower courts found the existence of any "fundamental" right or "suspect" classification, since both relied exclusively upon no "rational basis" for the City's refusal to check off. *Local 660 International Association of Firefighters, et al. v. City of Charlotte, et al., supra*, 391 F. Supp. at 502 (Finding of Fact No. 11).

The "compelling state interest" test should not apply. On brief in opposition to the writ of certiorari, respondents made the argument, implicitly rejected by the lower courts, that the City's refusal to check off impinges upon their First Amendment rights of association. Of course, any governmental classification can be said to impinge, to some degree, upon rights of association. *Rodriguez, supra*, 411 U.S. at 60 (Stewart, J., concurring); *Rinaldi v. Yeager*, 384 U.S. 304, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966). The question is whether the degree of impingement here, if any, mandates strict judicial scrutiny. Not every

limitation or incidental burden upon the exercise of a right expressly or implicitly guaranteed in the Constitution must be subjected to a stringent standard of review. *Pirincin v. Board of Elections of Cuyahoga County*, 368 F. Supp. 64, 71 (N.D. Ohio 1973); *Houston v. Prosser, supra*, 361 F. Supp. at 297-298; *Stottlemyer v. Stottlemyer*, 329 A. 2d 892, 895 (Pa. 1974). Furthermore, in determining whether the City's policy of refusing to check off union dues violates equal protection, a presumption in favor of the constitutionality of the City's actions must be indulged. *McGowan v. Maryland*, 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 (1961); *Pirincin v. Board of Elections of Cuyahoga County, supra*, 368 F. Supp. at 71.

There is no right to union dues check off explicitly or implicitly guaranteed by the Constitution. As noted, respondents argue in their brief opposing the writ of certiorari that refusal to check off impinges upon their rights to freedom of association guaranteed by the First Amendment although neither of the lower court opinions was based on such a finding. Such impingement, if it exists at all, is negligible, since it is conceded that respondents have a First Amendment right to belong to the union. *Atkins v. City of Charlotte, supra; See, Lontine v. VanCleave*, 483 F. 2d 966 (10 Cir. 1973); *Newport News F.F.A. Loc. 794 v. City of Newport News, supra.* The lower courts based their holdings upon the fact that the refusal to check off caused respondents to be ineligible for insurance plans and tended to hinder their ability to engage counsel. *See, e.g.*, District Court Findings of Fact Nos. 9 and 10, 391 F. Supp. at 502. In short, both courts found that the City's refusal to check off was "arbitrary and standardless", further found the existence of affirmative harm, *e.g.*, inability to obtain insurance, and accordingly concluded that the City's refusal to check off had no rational basis. *Id.* at 502-503. This is hardly the stuff from which fundamental rights arise. The City should not be forced to concede on a collective bargaining issue absent an express

finding of an impingement on a right more fundamental than that of obtaining group life insurance.

The subject "class" in the instant case can in no wise be called "suspect". A classification based upon union membership and a justifiable refusal to collectively bargain is not a classification based upon race, national origin, alienage, indigency or illegitimacy. *Rodriguez, supra,* 411 U.S. at 61 (Stewart, J., concurring).

Thus, the City's refusal to check off union dues impinges only on respondents' non-existent "right" to collective bargaining, not on their First Amendment right to freedom of association.

The City's policy of making certain wage deductions, while refusing to check off union dues, does cause some people to be affected differently from others. The equal protection clause is offended only if the City's policy is invidiously discriminatory, i.e., by establishing classifications that are wholly arbitrary or capricious. *Id.* at 60. The City is prohibited from collective bargaining. Dues check off is inextricably intertwined with collective bargaining. Thus, the City's refusal to check off union dues *has* a "rational basis." Indeed, to hold otherwise is to hold that the equal protection clause of the Fourteenth Amendment gives employees of the states and their political subdivisions the right to compel their employers to collectively bargain and, worse, that the employees take only the fruits and not the lumps. In sum, respondents have been totally frustrated in their previous efforts to show that they have a constitutional right to across-the-board collective bargaining. *Atkins v. City of Charlotte, supra; accord, Winston-Salem/Forsyth Cty. U.N.C. Assn. of Ed. v. Phillips, supra.* Having failed in their frontal assault, they are now seeking to raise *one element* of collective bargaining to the status of a fundemental right. Another element of collective bargaining is the strike, and respondents may

be expected to carry a successful outcome here to its logical conclusion.

There is no fundamental right to collective bargaining. *University of N.H. Ch. of AAUP v. Haselton, supra; Kirker v. Moore, supra,* 308 F. Supp. at 621; *Newport News F.F.A. Loc. 794 v. City of Newport News, supra,* 339 F. Supp. at 17. *A fortiori,* there is no fundamental right to check off. Even in the private sector, there was no right to collective bargaining until the enactment of the National Labor Relations Act. *See,* §1, National Labor Relations Act, §151, U. S. C. A. The right to collective bargaining should be conferred upon public employees only by Congress or the respective state legislatures.

The Fourth Circuit never talked about the "equal protection" clause, but apparently was relying on it because of its talk about "rational classification" and "no other standards or guidelines". If the Fourth Circuit is correct, then a new constitutional principle is being stated, namely that all elected makers of public policy must now state cogent reasons for all of their public decisions, and every time a City Council exercises its prerogative to make a decision it conceives to be the public wish and in the public interest, it must state a reason pleasing to the Federal Court. The question should be: "Was there a constitutionally valid reason for the City's action?" It should not be the question asked by the Fourth Circuit: "Did the City articulate its rationale?"

Public Policy

Amicus curiae fully comprehends that matters of constitutional right are not invariably dictated by public policy. However, it is significant that this Court in its long history has never held that the First Amendment grants to public employees the right to bargain collectively with their employer, the public. The

Congress has recognized the very material distinction between employees in the public sector and employees in the private sector. The real question here is whether this distinction is now to fade into memory by an innovative application of the First Amendment and/or the equal protection clause in a judicial rush to join the "Wave of the Future."

The opinion of the District Court and the opinion of the Fourth Circuit both fault the City of Charlotte for not having publicly stated legitimate reasons for distinguishing between checking off United Way contributions and checking off union dues. The reasons for distinguishing between these two are so obvious so as to require no statement, either from the City or from *amicus curiae*. They are the public policy of the City of Charlotte. They are the public policy of most municipalities and governmental units in the United States. They protect the people.

The general public recognition of the validity of this distinction is graphically illustrated by recent events in San Francisco, where the November 17, 1975 issue of *U.S. News & World Report*, at page 30, reports the following:

> By a 5-2 margin, San Franciscans approved a proposition forbidding strikes by police and firemen and requiring a no-strike pledge, with dismissal if it is broken. Police and fire forces recently struck and won high pay raises.

The thrust of the instant law suit is to blot out all distinctions between public and private employees, so as to create a powerful and publicly funded labor organization of public employees, obtaining a power position from which to demand and to enforce their will on the public. At the time the deputy sheriffs of Jefferson County were demanding check off (and simultaneously denying any claim to the right to strike) they, in fact, did strike in the form of a "sick in". Honorable William C. Barber took judicial notice of this fact from his own court records. Facts are facts.

If a long-standing public policy is to be eliminated in the name of the First Amendment freedoms or of equal protection, then the consequences of such a dramatic change must be fully understood and the risks carefully evaluated.

CONCLUSION

A deputy sheriff in Alabama serves judicial process. He makes arrests and reads the accused his rights. He protects life and property. He is as indispensable a part of the great American system of due process and public safety as is the Supreme Court of the United States. He shares another thing in common with members of the Supreme Court. He is not elected. He is appointed to his office, and serves during good behavior. In the opinion of *amicus curiae* he shares one other important thing in common with members of the Supreme Court. He is under paid, when one considers his increasing work load and inflation. Does the Supreme Court of the United States consider that it has the right to conduct a "sick in" or a "slow down" or a "strike" in order to force the public, through the elected Congress, to increase its compensation, or does the Supreme Court of the United States rely for fair treatment upon the political processes provided by the Constitution of the United States? If a deputy sheriff (or a fireman) has the right to insist upon full collective bargaining and upon union recognition in order to enforce his wage and work demands, his right, to be meaningful, must be based on the strike as the ultimate bargaining weapon, and no amount of rationalization can change the fact. The evidence is overwhelming. The total effect of such a doctrine would be devastating.

What this Court says in this case on the single most important issue to come before it this term, will have an impact far beyond the City of Charlotte, and far beyond 1975. It will be momentous. *Amicus curiae* humbly submits that the result will be

chaos if the Court does not overrule the self-contradicting and poorly reasoned opinion of the Fourth Circuit.

Respectfully submitted

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Certificate of Service

I, William M. Acker, Jr., one of the attorneys-of-record for *amicus curiae*, hereby certify that I have, by U. S. Mail postage prepaid, mailed a copy of the foregoing brief to Mr. Jonathan Wallas, Suite 730, East Independence Plaza, 951 South Independence Boulevard, Charlotte, North Carolina 28202, counsel for respondents-appellees, and to Mr. W. A. Watts, City of Charlotte, 600 East Trade Street, Charlotte, North Carolina 28202, counsel for petitioners-appellants, this 26th day of November, 1975.

.....

WILLIAM M. ACKER, JR.

APPENDIX

In the

Supreme Court of the United States

October Term, 1975

No. 75-250

City of Charlotte, a municipal corporation, the Charlotte City Council, the governing legislative body of the City of Charlotte, and Fred Alexander, James Whittington, Milton Short, Joe Withrow, Pat Locke, Kenneth R. Harris, and Neil C. Williams, as members of the Charlotte City Council and individually,

Petitioners,

v.

Local 660, International Association of Fire-Fighters, an unincorporated labor organization, and R. L. Middleton, W. M. Brawley, D. F. Black, M. L. Knight and R. D. McCall, as officers of Local 660 and individually,

Respondents.

No. 75-250

CONSENT FOR FILING BRIEF OF AMICUS CURIAE

Whereas the above-captioned case is now before the Supreme Court of the United States and is scheduled to be heard during the October Term of 1975; and

Whereas Melvin Bailey, Sheriff of Jefferson County, Alabama desires to file a brief of *amicus curiae* in the above-captioned case, he being in effect a public employer of employees who have filed an action against him in the U. S. District Court, the northern district of Alabama, Civil Action No. 75-M-0021, March 17, 1975, which case has raised substantially the same questions before the Court in the above-captioned case.

Now, Therefore, petitioners and respondents, through their respective attorneys, being all the parties before the Court do hereby voluntarily consent and agree that the said Melvin Bailey may file an *amicus curiae* brief on the merits in the above-captioned case in accordance with Rule 42, Section 2 of the Supreme Court Rules.

This the 13th day of November, 1975.

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In the United States District Court
For the Northern District of Alabama
Southern Division

American Federation of State, County and Municipal Employees Union, AFL-CIO, Local No. 2557; James C. Thomas, Robert H. Cordell; Harold Reach, Individually and as Representatives of a Class,
Plaintiffs,
vs.
Melvin Bailey, Sheriff of Jefferson County, Alabama; Jefferson County Commission, a Body Corporate and Politic; Tom Gloor, Benjamin Erdrich and W. Cooper Green as Members of the Jefferson County Commission,
Defendants.

Civil Action No. CA 75M0021S

COMPLAINT

1. The jurisdiction of this court is invoked under Title 42, United States Code, Section 1983 and Title 28, United States Code, Section 1331(a) and Section 1343(3) and (4).

2. Plaintiff union is a voluntary, unincorporated labor organization with principal offices located in Jefferson County, Alabama, and is engaged in this judicial district in representing deputy sheriffs who are employed by the Jefferson County Sheriff's Department. Individual plaintiffs are residents of Jefferson County, members of plaintiff union and are employed by Jefferson County Sheriff's Department.

3. The defendant sheriff of Jefferson County is a resident of Jefferson County and the elected head of the said Sheriff's Department. Defendant, Jefferson County Commission is a body corporate and politic. Said defendant is the governing body of Jefferson County. Said individual defendants are elected members of said County Commission and are residents of Jefferson County, Alabama.

4. This suit is brought by individual plaintiffs on their behalf and on behalf of others similarly situated. The class represented by individual plaintiffs consists of all employees of Jefferson County Sheriff's Department who are members of plaintiff union. This class is so numerous that joinder of all members is impractical. There are questions of law and fact common to the class. The representative plaintiffs will fairly and adequately protect the interests of the class and plaintiffs are typical of the class.

5. Plaintiffs have sought to exercise their rights as employees and union members and have sought to have their union dues deducted from their pay checks and paid to plaintiff union. The defendants have failed or refused to allow plaintiffs to do so; and for no good reason other than to hinder said employees in the exercise of their rights to form and belong to a labor union. Even though other deductions are allowed for other employees for other reasons and for the benefit of other organizations.

6. Defendants have sought to discriminate, and have in fact discriminated, in the hiring of new employees by asking them how they feel about belonging to a union, and would they become a union member if they were hired. If they were in favor of a union they were not hired.

7. Defendants have failed and refused to pay plaintiffs for sick leave; after said plaintiffs met the requirements for obtaining paid sick leave. This action taken by the defendants because plaintiffs are union members. Defendants discriminate against plaintiffs in "paid sick leave" in that those who *are* union members are not paid and those who *are not* union members are paid.

8. Defendants harrass plaintiffs who are members of plaintiff union, by following them around on their beats (while patroling); lowering their efficiency ratings, and transferring them from one assignment to another solely because of their activities in plaintiff union.

Wherefore, Premises Considered, plaintiffs pray the court shall enter its order:

1. Temporarily mandatorily enjoining defendants:

(a) From preventing plaintiffs obtaining dues check off with regard to their dues being deducted from their pay checks and paid to plaintiff union.

(b) From discriminating in hiring new employees who desire union membership; or who are sympathetic to the plaintiff union.

(c) From refusing to pay plaintiffs for sick leave when the requirements for obtaining sick leave are met by plaintiffs.

(d) From harrassing plaintiffs in any way whatsoever because of membership in said union.

2. That said injunction be made permanent upon final hearing.

3. That the rights, duties and responsibilities of the parties be declared by the court in regards to the controversies contained in this complaint.

4. For such other relief as may be just and proper, premises considered.

TARTER & WININGER
Counsel for Plaintiffs
By /s/ CHARLES TARTER
2101 City Federal Building
Birmingham, Alabama 35203

State of Alabama
Jefferson County } ss.

Before me, the undersigned Notary Public in and for said County in said State, personally appeared Harold Reach, as President of Plaintiff Union; Harold Reach individually, James C. Thomas, Robert H. Cordell, who being by me first duly sworn depose and say that the facts set forth in the foregoing Bill of Complaint are true and correct to the best of their knowledge, information and belief and upon such information, knowledge and belief aver that said facts are true.

Done this the 18th day of December, 1974.

/s/ HAROLD REACH
As President of Local 2557
/s/ HAROLD REACH
/s/ JAMES C. THOMA
/s/ ROBERT H. CORDELL

Sworn and Subscribed before me this 18th day of December, 1974.

/s/ MARIANNE McMANUS
Notary Public

(Seal)

In the United States District Court for the
Northern District of Alabama
Southern Division

American Federation of State, County, and Municipal Employees Union, AFL-CIO, Local No. 2557; et al., Plaintiffs
v.
Melvin Bailey, Sheriff of Jefferson County, Alabama; et al., Defendants
} Civil Action No. 75-M-0021

ORDER

This cause came on to be heard on defendants' motions to dismiss the complaint. The Court has examined the pleadings, considered the briefs submitted by the parties and has heard the oral argument of counsel. The Court is of the opinion that the motions are due to be granted in part and overruled in part.

I

Paragraph 5 of the complaint is due to be dismissed. Plaintiffs allege a deprivation of rights under the Equal Protection Clause of the fourteenth amendment in that defendants refuse to allow a voluntary deduction from employee pay checks for union dues. This contention is not sufficient to state a claim, under present law.

Union dues check-off is a familiar part of the collective bargaining process in the private sector. It is, at the very least, a

permitted subject for collective bargaining under the NLRA. Check-off is a frequent component of union contracts. It is apparent that check-off is so closely intertwined with collective bargaining that it is impossible to speak of it outside that context.

This close identification of dues check-off with collective bargaining raises an unsurmountable barrier for the plaintiffs. The sheriff and the County Commission have no duty to bargain with any representatives of the employees under Alabama or federal law. *AFSCME, Local 2557, et al. v. Bailey, et al.*, C.A. No. 73-P-199-S (N.D. Ala., June 13, 1973, Dec. 19, 1973) (hereinafter *Bailey I*); 29 U.S.C.A. § 152(2). Since plaintiffs may not force defendants to the bargaining table for general negotiations, the plaintiffs may not force defendants to bargain about one item that is inextricably part of the general collective bargaining process. The Court is not in a position to grant plaintiffs part of the fruits of collective bargaining when they are not entitled to any of those fruits.

Moreover, the plaintiffs are seeking an order of the Court to force defendants to allow union dues check-off. In the private sector, the employer need not grant a union demand for dues check-off. 29 U.S.C.A. § 158(d). If such a provision is included in the final contract, it is the product of the give and take of the bargaining process, perhaps with the union conceding a point in order to obtain the benefits of the checkoff. In the case at bar, plaintiffs, who do not have any collective bargaining "rights," wish the Court to give them a benefit they would not necessarily obtain if they could force defendants to bargain. Thus, the plaintiffs are left in the position where they do not have the same rights as private employees, and yet are demanding, as a matter of right, an item private employees can only hope to acquire through negotiation. The Court will not create a situation where public employees have at once more, and

less, rights than private employees, under the present state of the law in this area.[1]

Under the foregoing analysis, the plaintiffs are unable to state any set of facts under which they should be entitled to the relief they request. They are foreclosed by law. The Court declines to follow *Local 660, International Association of Fire Fighters v. City of Charlotte*, No. C-C-73-236 (N.D. N.C., September 4, 1974).

II

Paragraph 6, 7 and 8 do state a claim on which relief can be granted, even though paragraph 6 suffers a lack of clarity and precision. Defendants argue that *Bailey I* forecloses this Court from acting on at least some of the issues raised by these paragraphs, or that plaintiffs are due to be remitted to their right to seek a contempt citation for disobedience of the judgment entered in *Bailey I* before the judge who decided that case. This problem is more apparent than real, as the Court does not foresee any problem in conforming its action to the principles laid out in *Bailey I*, and will not be slow to remedy any contravention of the order entered by Judge Pointer. The fact that this Court is composed of a number of judges does not affect its essential unity.

Defendants also raise the question of whether plaintiffs should be required to state these claims as compulsory counterclaims in *Bailey v. AFSCME, Local 2557, et al.*, C.A. No. 188-000,

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[1] Defendants also contend that paragraph 5 is barred as res judicata from *Bailey I*. While the Court need not reach this point, given its disposition of paragraph 5, it would note that *Bailey I* was concerned with the first amendment rights of deputy sheriffs, and not their fourteenth amendment rights. The findings made in *Bailey I* expressly do not foreclose the issue of dues check-off. Under these circumstances, defendants' position does not seem well-taken.

Circuit Court for the Tenth Judicial Circuit of Alabama, under Rule 13(a), Ala. R. Civ. Pro. The Court sees this as a question of comity, and deems it inappropriate to deprive plaintiffs of their federal forum at this point in time.[2] The Court will take the proper action to avoid any undue interference with the state court action, should the need for such action arise in the future.

III

Accordingly, it is Ordered, Adjudged and Decreed that defendants' motions to dismiss be, and the same hereby are, granted as to paragraph 5 of the complaint. In all other respects the motions are overruled. Paragraph 5 of the complaint is hereby dismissed. Defendants shall answer the remaining claims within thirty days of the date of this order.

Done this 17th day of March, 1975.

/s/ FRANK H. McFADDEN
Chief Judge

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[2] The Court has been informed by counsel that the state court action, which dealt with injunctive relief against a "sick-out" by the deputies, is essentially over. The Court notes that the temporary restraining order entered in the case ran out, at the end of the last consent extension, on February 14, 1975.

In the Circuit Court
For the Tenth Judicial Circuit
of Alabama
In Equity

Melvin Bailey, as Sheriff of Jefferson County, Alabama,
Plaintiff,
v.
Tom Gloor, Ben Erdreich, Criss H. Doss, as Members of the Jefferson County Commission, Jefferson County, Alabama,
Defendants.

Civil Action.
No. 193-537.
In Equity.

COMPLAINT

Comes now Melvin Bailey, Sheriff of Jefferson County, Alabama, and sues Tom Gloor, Ben Erdreich, and Chriss Doss, as members of the Jefferson County Commission, and shows the court the following:

1. Plaintiff is the duly elected and acting Sheriff of Jefferson County, Alabama.

2. Defendant Tom Gloor is the duly elected president of the Jefferson County Commission. Defendants Ben Erdreich and Chriss H. Doss are duly elected and serving as Associate Commissioners of the Jefferson County Commission, a body corporate and politic, and said body is the governing body of Jefferson County, Alabama.

3. This is an action for a declaratory judgment that defendants have no legal authority to order plaintiff to deduct or "check off" union dues from the paychecks of the employees of the Jefferson County Sheriff.

4. Subject to the requirements of the Jefferson County Civil Service System, §§ 645 et seq., Appendix, Code of Alabama 1940 (Recomp. 1958), plaintiff, as Sheriff of Jefferson County, has ultimate supervisory power over the terms and conditions of employment of the employees of the Jefferson County Sheriff.

5. Employees of the Jefferson County Sheriff have no legal right to collective bargaining.

6. Dues "check off" is an essential concomitant of the collective bargaining process.

7. Plaintiff alleges the existence of a justiciable controversy in that defendants take the position that they have legal authority to order plaintiff to "check off" union dues of employees of the Jefferson County Sheriff, as more fully appears from Exhibits A and B attached hereto and made a part hereof.

Wherefore, plaintiff prays:

1. That process issue to each defendant.

2. That this court take jurisdiction of this cause and enter an order finding that, subject to the requirements of the Civil Service System of Jefferson County, §§ 645, et seq., Appendix, Code of Alabama 1940 (Recomp. 1958), plaintiff has ultimate supervisory power over the terms and conditions of employment of the employees of the Jefferson County Sheriff, that employees of the Jefferson County Sheriff have no right to collective bargaining, that the issue of union dues "check off" is an essential concomitant of the collective bargaining process, that defendants, as Commissioners of Jefferson County, Alabama, have no authority to order plaintiff to check off union dues of employees

of the Jefferson County Sheriff, and that plaintiff have such other and further relief as is just.

/s/ FRANK DOMINICK
FRANK DOMINICK
/s/ EZRA B. PERRY, JR.
EZRA B. PERRY, JR.
Attorneys for Plaintiff

DOMINICK, FLETCHER, YEILDING,
DOMINICK & ACKER, P.A.
927 Brown-Marx Building
Birmingham, Alabama 35203
Of Counsel

EXHIBIT A

Jefferson County Commission
Ben Erdreich
Commissioner of Public Welfare
200-A Courthouse Birmingham, Alabama 35203
Telephone (205) 325-5504

August 21, 1975

Honorable Melvin Bailey
Sheriff of Jefferson County
Jefferson County Courthouse
Birmingh m, Alabama 35203

Dear Sheriff Bailey:

As you know several weeks ago, one of your deputies wrote to the Commission requesting deduction of monthly dues to his labor organization. Previously, there have been similar verbal requests from deputies on this matter.

By letter to the Commission you stated that you believed this issue was within your managerial prerogative as Sheriff and employer of Sheriff's Department employees.

It is my intent to bring this matter to the Commission for action by it next Tuesday. In view of your prior letter to us, I wanted to advise you of my action.

Sincerely

s/ BEN ERDREICH
BEN ERDREICH

BE/alb

EXHIBIT B

Thurs., Aug 21, 1975 The Birmingham News—31

Banking of the South.

Erdreich to call up checkoff

By Frances Spotswood
News staff writer

In a turn-around move next week, Jefferson County Commissioner Ben Erdreich will call for action on the issue of union dues checkoff.

For the past three years spokesmen for the sheriff's deputies union have been bringing up checkoff, asking the county commission to approve the deduction of union dues from union members' paychecks.

Tuesday, the county commissioner will bring up the matter.

Erdreich said he would have brought it up today for preliminary discusssion but the regular pre-commission meeting was cancelled for lack of a quorum. (In fact all three commissioners were away from the courthouse today.)

What Erdreich is going to bring up for commission is the latest formal union dues checkoff request—a letter from the deputies union president which was presented at the July 1 commission meeting.

In that letter President Harold Reach asked the commission to deduct one-twelfth of the annual union dues ($96) from his salary each month and submit the $8 to Local 2557 of the American Federation of State, County and Municipal Employes.

At the same meeting the County Commission read a letter from Sheriff Mel Bailey stating that dues checkoff is a "management prerogative of the Sheriff."

THE COMMISSIONERS simply referred the letters to County Atty. Andy Strickland.

Tuesday, Erdreich will call for action on Reach's letter and similar verbal requests.

The county commissioner has notified Sheriff Bailey by letter that he intends to do so, saying, "I wanted to advise you of my action . . . in view of your prior letter (which) stated that you believed this issue was within your managerial prerogative as Sheriff and employer of Sheriff's Department employes."

Erdreich commented Wednesday that there was a touch of irony in bringing up Reach's letter for commission action, but, he said, "Many others have made the same request."

Reach was dismissed from the Sheriff's Department in late July. He continues to serve as president of the deputies union and has appealed his discharge to the Jefferson County Personnel Board which will hear the appeal Oct. 16.

Although the union dues checkoff request has been made repeatedly, the issue has never come to a vote by the present county commission.

The previous commission unanimously denied the checkoff on several occasions.

Commission President Tom Gloor is the only member of the present commission who was in office when earlier votes were taken.

Circuit Court, Tenth Judicial Circuit of Alabama
Equity Division

Melvin Bailey, as Sheriff of Jefferson County, Alabama,
Plaintiff,
vs.
Tom Gloor, et al.,
Defendants.
Case No. 193-537.

FINAL DECREE

This cause presents a justiciable controversy properly brought in a court of equity. The pleadings require a declaration by the Court relative to an existing dispute between the Sheriff of Jefferson County and the members of the Jefferson County Commission. The prayer of the Bill of Complaint is that the Court declare that "plaintiff (the Sheriff) has ultimate supervisory power over the terms and conditions of employment of the employees of the Jefferson County Sheriff, that employees of the Jefferson County Sheriff have no right to collective bargaining, that the issue of union dues 'check-off' is an essential concomitant of the collective bargaining process, that Defendants, as Commissioners of Jefferson County, Alabama, have no authority to order Plaintiff to check-off union dues of employees of the Jefferson County Sheriff, and that Plaintiff have such other and further relief as is just". Although the Birmingham Labor Council and the United Steel Workers of America, AFL-CIO were not original parties, this Court did, at its own instance, invite their intervention in the cause and such Petition of Intervention is filed of record. The parties agreed, at a pretrial conference, that the issues involved in the cause could be agreeably submitted upon a stipulation of the parties, leaving

only the resolution by the Court of the legal questions as posed by the pleadings and the proof offered in the content of the stipulation. The said stipulation has been prepared and executed by all of the parties to the cause. The Court has heard statements and arguments of counsel and has been edified by excellent briefs submitted by the individual parties.

The Court finds as follows:

1. That the subject "check-off" system is an essential concomitant of the collective bargaining process.

2. That neither Plaintiff nor Defendants have any duty or authority to collectively bargain with unions or representatives of the employees of Jefferson County under Alabama or Federal law. (AFSCME, Local 2557, et al., Civil Action No. 73-P-199-S (N.D. Ala., June 13, 1973, December 19, 1973) AFSCME, Local 2557, et al. v. Bailey, et al., Civil Action No. 75-M-0021-S (N.D. Ala., March 17, 1975; 29 USCA, § 152 (2); Nichols v. Bolding, 291 Ala. 50, 277 So. 2d 868 (1973); Government and Civic Employees Organizing Committee, CIO v. Windsor, 146 F. Supp. 214 (N.D. Ala. 1953).)

3. That the Commissioners of Jefferson County, Alabama have no authority to order Plaintiff to check-off union dues of employees of the Jefferson County Sheriff nor to implement any such check-off.

4. That the Jefferson County Sheriff has no authority to check-off union dues of employees of the Jefferson County Sheriff nor to implement any such check off.

There exists in this case a crucial and far-reaching problem of public policy in this case, and this problem is dealt with and decided herein under the prayer for general relief as contained in the pleading. "Check-off" is inextricably intertwined with collective bargaining (see foregoing authority) and collective bargaining is inextricably interwined with the right to strike. The

general public has been granted immunity from threats of strike as a matter of legal history. Public employees are, in effect, working for themselves as members of the public body. We have seen graphic examples of the strike weapon in the City of New York and other states and even, lately, in the City of Birmingham and the chaotic and traumatic effect which has been produced thereby upon the whole public economy and the health, safety and general welfare of the public. Law enforcement personnel are particularly subject to having waived rights, when they engaged upon the pursuits of their employment, which they would have guaranteed to them if they were operating in the private areas of employment.

Nothing herein contained is meant by the Court to derogate from the legal and laudable activities of labor unions and their employee members, generally. We only treat of the subject submitted to the Court which involves labor union members who are government employees and their employers.

Accordingly, it is Considered, Ordered, Adjudged and Decreed by the Court as follows:

One: That the Commissioners of Jefferson County, Alabama have no authority to order Plaintiff to check-off union dues of employees of the Jefferson County Sheriff nor to implement any such check-off.

Two: That the Jefferson County Sheriff has no authority to check-off union dues of employees of the Jefferson County Sheriff nor to implement any such check-off.

Three: The costs of this action are taxed as follows: One-half (½) to Plaintiff and one-half (½) to Defendants.

Done and Ordered this 6th day of October, 1975.

/s/ W. C. Barber
Circuit Judge in Equity Sitting